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ESET, LLC
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION
13

14 NSS LABS, INC.,

15 Plaintiff,

16 v.

17 CROWDSTRIKE, INC., SYMANTEC
18 CORPORATION, ESET, LLC, ANTI-
MALWARE TESTING STANDARDS
19 ORGANIZATION, INC. AND
DOES 1-50, INCLUSIVE,

20 Defendants.
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Case No. 5:18-cv-05711-BLF

**DEFENDANT ESET, LLC'S REQUEST
FOR JUDICIAL NOTICE IN
SUPPORT OF MOTION TO DISMISS;
DECLARATION OF RIGHARD
ZWIENENBERG IN SUPPORT OF
SAME**

Date: February 7, 2019

Time: 9:00 AM

Location: Courtroom 3

Hon. Beth Labson Freeman

PLEASE TAKE NOTICE that Defendant ESET, LLC (“ESET”), in connection with its concurrently-filed Motion to Dismiss, hereby requests pursuant to Rule 201 of the Federal Rules of Evidence that the Court take judicial notice of the following document, a true and correct copy of which is authenticated by the attached Declaration of Righard Zwienenberg.

- **Exhibit 1:** A true and correct copy of the pages on AMTSO’s member website listing the AMTSO members who voted against adopting the “Testing Protocol Standard for the Testing of Anti-Malware Solutions” (the “Standard”).

This Court may properly take judicial notice of this document pursuant to Federal Rule of Evidence 201. The Complaint refers to and quotes from portions of AMTSO’s website, specifically including the portions of the website reflecting the voting on the Standard, but does not physically attach the contents of the website. *See, e.g.*, Complaint, ¶ 52, 75; *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (“[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.”).

In addition, the result of the voting on the Standard is judicially noticeable because it is crucial to Plaintiff’s claims in this lawsuit, because Plaintiff repeatedly alleges that the approval of this Standard by AMTSO members was an unlawful antitrust conspiracy. *See, e.g.*, Complaint, ¶ 171 (“Defendants have used AMTSO to enact the anti-competitive AMTSO Testing Standard....”); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (district court may take judicial notice of “documents crucial to the plaintiff’s claims, but not explicitly incorporated in his complaint”, thereby “[p]reventing plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based.”).

This request is based upon this Request, the accompanying Declaration of Righard Zwienenberg, the pleadings and papers on file in this action, and such oral argument as the Court may entertain.

1 Dated: November 26, 2018

2 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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4 By /s/ Michael W. Scarborough
5 MICHAEL W. SCARBOROUGH
6 DYLAN I. BALLARD
7 MONA SOLOUKI

8 Attorneys for Defendant
9 ESET, LLC
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DECLARATION OF RIGHARD ZWIENENBERG
IN SUPPORT OF ESET'S REQUEST FOR JUDICIAL NOTICE

I, Righard Zwienenberg, declare:

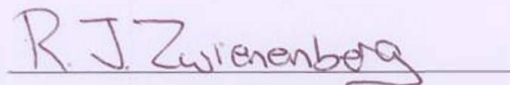
1. As an independent contractor, I am a Senior Research Fellow at ESET, spol. s r.o., the parent company of ESET, LLC. I have been in that position since 2012. My duties in that role include representing ESET spol. s r.o. before the Anti-Malware Testing Standards Organization, Inc. ("AMTSO") and voting at AMTSO meetings on ESET spol. s r.o.'s behalf.

2. I attended an AMTSO meeting on behalf of ESET spol. s r.o. on May 21 and 22, 2018 in Portland, Oregon. At that meeting, AMTSO members were asked to vote on whether the proposed Testing Protocol Standard for the Testing of Anti-Malware Solutions (the "Standard"), (*see* Complaint, Exhibit A) should be finally adopted. On behalf of ESET spol. s r.o., I voted that the Standard should not be adopted by AMTSO.

3. The votes made at AMTSO meetings are recorded on AMTSO's website for members (<https://members.amtso.org>), to which all AMTSO participants are provided login credentials. Attached hereto as **Exhibit 1** is a true and correct copy of the relevant pages on AMTSO's member website listing the AMTSO members who voted against adoption of the Standard, which includes ESET, spol. s r.o.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 21, 2018 at 's-Gravenhage, The Netherlands



RIGHARD ZWIENENBERG